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No. 94-990

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.

Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondent's opposition brief, instead of squarely addressing the arguments raised in Petitioners' brief, argues against straw-man issues that Petitioner did not assert. It also misstates the basis of the Supreme Court of Colorado's ruling.

I. THE IMPORTANCE OF SOCIAL CONTEXT

Petitioners have never claimed, as asserted by Respondents, that ". . . a statement made in a daily hard news broadcast . . . can never be constitutionally protected as rhetorical hyperbole under the Bresler-Letter Carriers-Falwell line of cases. . .".[1] Petitioners do maintain that the Supreme Court of Colorado erred when it failed to take into account that the broadcast statements were in the context of an investigative report on a daily television newscast, where

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[1]Opposition Brief, p. 10.

viewers expect statements of fact, not imaginative expressions of rhetorical hyperbole. This error led to the Supreme Court of Colorado's mistaken application of the principles announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

Petitioners have never claimed, as asserted by Respondents, that this Court should establish an "analysis-by-classification" approach[2] to the question of whether a statement is accorded constitutional protection as "opinion." To the contrary, Petitioners maintain, simply, that an analysis of social context, i.e., whether a statement appears in a forum where imaginative expression is expected or one where it is not, is a vital part of any correct application of the verifiability test announced in Milkovich.

The importance of the social context of a statement when applying the verifiability test is illustrated by comparing the correct analysis presented in the Moldea II decision (discussed in detail in the Petition) to the striking lack of social context analysis in Living Will Center. Moldea II did not establish in the D.C. Circuit a black and white rule that book reviews always contain only constitutionally protected opinion. Instead, it corrected the error of Moldea I by according substantial weight to the social context of the alleged defamatory statements in determining whether the statements were verifiable and therefore actionable under Milkovich. Petitioners seek the same sort of correction in this case.

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[2]Opposition Brief, p. 10.

II. THE SOCIAL CONTEXT OF THE BROADCAST WAS AN INVESTIGATIVE NEWS REPORT, NOT A DEBATE

Respondents mischaracterize the broadcasts as a debate between parties with opposing views on a public controversy.[3] The purpose of Respondents' misleading portrayal of the broadcasts is an attempt to take advantage of the latitude this Court has traditionally granted to imaginative and sometime vituperative expression occurring in debates and public disputes.[4] The broadcasts were, by no stretch of the imagination, a debate over a controversial issue.[5] They were, instead, a carefully created, meticulously edited, investigative news report about the conduct of a private business prepared by a veteran television reporter without any deadline pressure. The policy protecting free and inventive expression in the discussion of public issues has no application to what occurred here: a broadcast of Respondents' assertions,[6] prepared for Respondents' own

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[3]Opposition Brief, p. 13, fn. 7 ("KCNC presented Marsh's remarks . . . in the context of a debate about commerce in living wills. . .").

[4]See, e.g., cases cited in Opposition brief at p. 7, fn. 2: Bresler (use of term "blackmail" by political opponents to describe developer's tactics at a public hearing on zoning); Letter Carriers (use of term "scab" and "traitor" in context of a heated labor dispute).

[5]Contrary to Respondents' statements, the transcripts clearly show that the subject of the right-to-die was not mentioned in the broadcast, and Petitioners have never conceded that it was. Opposition Brief, p. 11, fn. 6.

[6]The fact that Dr. Marsh made the statements "scam" and "taken" does not shield Respondents from liability. It is basic tenet of libel law that a republisher of a libel is subject to the same liability as the original

purposes, warning the public that a private, local business was engaging in fraudulent and deceptive practices.

Respondents' mischaracterization of the social context of the broadcasts as a debate further underscores the importance of the social context in applying the verifiability test. Had these statements been made in an authentic television debate, like William F. Buckley's "Firing Line" program or CNN's "Crossfire" program, a viewer would have been alerted to expect hyperbole and imaginative expressions of opinion and the weight of the social context analysis would be in favor of constitutional protection for the statements.

Mr. Hastings never debated Dr. Marsh. In fact, they have never met. The interviews with Merrill Hastings and Dr. Marsh were separately pre-recorded and filmed entirely independent of each other. Then Respondents subtly interwove the video tapes prior to news time.

Further, Petitioners first learned of the accusations while viewing the actual newscast when it was reported that their business was "a scam", that their customers had "been taken . . . totally taken" and that their products were "unnecessary -- certainly not worth paying for." Petitioners were never given a chance to rebut these accusations on the air, even though they demanded such an opportunity immediately after the first newscast. Thus, no debate ever occurred.

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publisher. Restatement (Second) of Torts, § 578 (1977).

III. THIS WAS NOT "NEUTRAL REPORTAGE" OF A DEFAMATORY STATEMENT.

Respondents contend that they were simply reporting competing views on a matter of public interest.[7] Some courts have established a doctrine, known as "neutral reportage", which protects media defendants from libel claims when they are reporting newsworthy defamatory statements made by others.[8] However, media defendants must neutrally report the defamatory statements and may not espouse or concur with the defamatory statement if they are to avoid liability under this principle.[9] Here it is clear from the transcripts of the broadcast that Respondents openly supported the view that Petitioners' product was unnecessary and "certainly not worth paying for", and that "a scam" was being perpetrated on the public by Petitioners.[10]

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[7]Opposition brief, pp. 10-11 ("News reports . . . frequently present opposing views."),

[8]See, Edwards v. National Audubon Society, 556 F.2d 113 (2d Cir.), cert. denied sub nom Edwards v. New York Times, 434 U.S. 1002 (1977); R. Smolla, Law of Defamation, (Section 4.14, p. 4-68, Release #7, January 1994).

[9]See, Barry v. Time, Inc., 584 F.Supp. 1110, 1126-27 (N.D. Cal. 1984) ("It is the neutrality of the report which is critical.").

[10]Petition, p. 53-a (The station's newscaster opens the broadcast by stating: ". . .should you pay to get one? . . . a new Denver Company is capitalizing on the living will trend, charging $29.95." Respondent McCarroll: ". . . this is really exploiting people's fear of death."); Petition, p. 57-a (The station's newscaster summarizes the report by stating: "So we still have a chance though to get this [Petitioner's product] for $29.95 cheaper from University officials here?" Respondent McCarroll: "Right.") (emphasis added); Petition, p. 59-a (The reporter summarized the second broadcast by asserting the Respondents' views:

IV. THERE IS NO INDEPENDENT STATE GROUND FOR THE LIVING WILL CENTER DECISION.

Respondents contend that the Supreme Court of Colorado ruled that the Colorado Constitution was the ground for its ruling.[11] However, one searches in vain for language in the Living Will Center decision that supports this statement. The Supreme Court of Colorado interpreted and applied the Milkovich decision, not Colorado law.

After summarizing both state and federal law, the court's holding is that ". . . the terms 'scam' and 'taken' as well as the substance and gist of the broadcasts neither contain or imply a verifiable fact nor can they reasonably be understood as an assertion of actual fact about The Living Will Center's product. Therefore, we hold that the broadcasts are constitutionally privileged."[12] This is unequivocally a summary of the verifiability test announced in Milkovich, not a holding based on Colorado law.[13]

Respectfully submitted,

"But there is a way to get all the necessary forms free of charge or for just a nominal fee. You don't have to pay $29.95.").

[11]Opposition Brief, p. 9, fn. 3.

[12]Petition, p. 13-a.

[13]The Supreme Court of Colorado summarized the Milkovich verifiability standard as follows: "Under the Milkovich standard, therefore, a court must determine whether the statement contains or implies a verifiable fact about the plaintiff and second, whether the statement reasonably is susceptible to being understood as an actual fact." Petition, p. 10-a. The holding in Living Will Center uses the same language.

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